CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

WESTERN DISTRICT, SEPTEMBER TERM, 1819.

West. District. *Sept.* 1819.

PHILLIPS *vs.* CURTIS.

PHILLIPS vs. *CURTIS.*

If payment be made of a debt of the succession to a person declared heir to it, pending the appeal of the judgment which declared him so, and on the affirmance of the judgment a devolutive appeal is taken from the affirming judgment, the payment will be valid notwithstanding the payee is at last decreed not to be the heir.

APPEAL from the court of the sixth district.

MARTIN, J. delivered the opinion of the court. This case differs from that of *Phillips* vs. *Johnson & al.* determined during the last term, *ante*, 226, in this particular only; the payment was made on the 22d of May, 1816, that is to say, pending the appeal in the district court; while in the former case, there was evidence of it after the judgment in the district court.

The present plaintiff having neglected to resort to such an appeal to this court, as would have suspended the execution of the judgment

West. District. *Sept.* 1819.

PHILLIPS vs. CURTIS.

of the district court, the right of James Rogers to retain the payment made to him by the present defendant, became absolute. If the latter had contended that he had paid to Rogers what he had no right to demand or receive, and claimed restitution, Rogers would have repelled his claim by the production of the judgment of the district court, the execution of which was not suspended, authorising him to compel by legal means the payment of that very money, which it could have been before successfully contended he had no right to demand.

If, before the judgment of the district court, he had no right to the money, his receipt thereof made him a debtor to the present defendant. But the subsequent judgment rendering him a creditor, the debt was extinguished by confusion; and he became the absolute owner of the money, as if it had been paid to him after the judgment.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Baldwin for the plaintiff, *Johnson* for the defendant.

West. District. Sept. 1819.

DAY vs. FRISTOE & AL.

DAY
vs.
FRISTOE & AL.

A process verbal of the sale of real estate, not subscribed, nor shewn to be in the handwriting of the officer selling, cannot support a writ of seizure.

APPEAL from the court of the sixth district.

DERBIGNY J. delivered the opinion of the court. In this case, an order of seizure was obtained by the plaintiff against two lots of ground in this town, struck off to James Cannon at the public sale of the estate of the late Lloyd Day, the plaintiff's ancestor. The defendants are third possessors of these lots, and plead, that if the plaintiff has any title to them, it is not such an one as could authorise the summary mode of proceeding by seizure. They further alledge that one of them is the legal owner of the lots, by a regular claim of conveyance from the original proprietor of the town.

We consider that, in the present state of the cause, the only question submitted to us is, whether the title of the plaintiff is one of those upon which an order of seizure may at once issue; for the decree, from which an appeal is claimed, goes no further than setting aside the order obtained, and condemning the plaintiff to the costs of that proceeding.

The priviledge of proceeding by seizure is a remedy granted by the Spanish law in cases where the plaintiff is bearer of a title which imports a confession of judgment. The title of the

West. District. *Sept.* 1819.

DAY vs. PRESTON & AL.

vendor of real estate is of that class; and, as our laws give him a priviledged mortgage on the thing sold, it has always been deemed sufficient (and we think reasonably) to produce the evidence of such sale, in order to be entitled to the benefit of that mode of proceeding. But that evidence must be such as the law requires; an authentic public act in due form. Here the instrument, on which the order of seizure appears to have been granted, purports to be a copy of a process verbal of the public sale of Lloyd Day's estate; but that process verbal neither bears the signature of the public officer who made that sale, nor is shewn even to be written by him. Whether it may be supported by other proof, upon a trial of the plaintiff's title in the ordinary course of proceeding, is not a question here: we have only to say that, in its present shape, it is not sufficiently authentic to authorize a summary proceeding by seizure.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Wilson for the plaintiff, *Baldwin* for the defendants.

West. District. *Sept.* 1819.

PHILLIPS v. FULTON'S HEIRS

PHILLIPS vs. *FULTON'S HEIRS.*

APPEAL from the court of the sixth district.

If a debt be paid to the person who had, at the time, the right to demand it, it is extinguished.

MARTIN, J. delivered the opinion of the court. No circumstance distinguishes this case from that of *Phillips* vs. *Curtis* just decided, *ante*, 237. The defendants' money having been in the hands of the person, who was authorised to receive what they owed to the estate of the late A. Phillips, the payee had a right to retain it; and the payors could not reclaim it: so the debt was *ipso facto* extinguished.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Baldwin for the plaintiff, *Blanchard* for the defendants.

HUBBARD & AL. vs. *FULTON'S HEIRS.*

APPEAL from the court of the sixth district.

It cannot be opposed to the endorsee, that the note was given to the original payee, in discharge of a debt, which it appears he

MARTIN, J. delivered the opinion of the court. The plaintiffs, as endorsees, brought this action on a note of the defendants' ancestor to James Rogers.

West. District. *Sept.* 1819.

HUBBARD & AL. vs. FULTON'S HEIRS.

had no right to demand or receive.

They pleaded the general issue, and, that their ancestor gave the note, on which the present suit is brought, to James Rogers, in discharge of a judgment obtained against him, Fulton, by the curator of the estate of A. Phillips, deceased, to which James Rogers was decreed to be heir, by a judgment of the district court, which has since been reversed by the supreme court, who has decreed the whole of the estate of the deceased to Thomas Phillips, who has brought suit for the amount of the judgment intended to be paid to James Rogers, by the note on which the present suit is brought; so that, if the defendants fail in it, they will be compelled to pay the money twice.

The execution of the note, and indorsement was admitted; and the allegations in the special plea were proven—there was judgment for the plaintiffs; and the defendants appealed.

Admitting that the matter, pleaded in avoidance, would have repelled the claim in the hands of James Rogers, the original payee, his indorsees cannot be affected thereby.

It is, therefore, ordered, adjudged, and decreed, that the judgment of the district court be affirmed with costs.

Johnson for the plaintiffs, *Scott* for the defendants.

West. District. *Sept.* 1819.

PHILLIPS vs. KILGOUR.

PHILLIPS vs. KILGOUR.

A debt is extinguished by payment to a person decreed to be entitled thereto, twenty days after the time, during which an appeal might have suspended the execution of the decree.

APPEAL from the court of the sixth district.

MARTIN, J. delivered the opinion of the court. This case differs from that of *Phillips* vs. *Johnson & al.* determined in August term, *ante*, 226, in no material circumstance.

The payment to James Rogers having been made on the 23d of July, 1816 (twenty days after the time was elapsed, during which, an appeal might have suspended the execution of the judgment of the district court) discharged the debt.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed with costs.

Baldwin for the plaintiff, *Johnson* for the defendant.

HALL vs. *SPRIGG.*

One who purchases land for, paying it with the money of, another, will be compelled to convey it. Parol evidence will be received that if

APPEAL from the court of the sixth district.

DERBIGNY, J. delivered the opinion of the court. The plaintiff and appellant complains that the appellee retains for himself and pretends to keep possession of a tract of land, which he had

West. District. *Sept.* 1819.

HALL vs. SPRIGG.

purchased for the appellant, and the price of which he paid with the appellant's money. The jury found the facts to be as represented by the plaintiff; and judgment having nevertheless been rendered against him, he appealed.

was so bought and paid for, although the purchaser took the deed in his own name.

The principles in matter of agency are generally so certain, and the duties of the agent so well understood, that we do not deem it necessary to enter into much demonstration on so plain a subject. *Sicut liberum est mandatum non suscipere, ita susceptum consummari oportet.* The obligation once contracted must be complied with. If the proxy, who bought a thing for his principal, caused the contract of sale to be made in his own name, instead of the name of his constituent, there remains something to be done on his part to fulfil his obligation, and that is, to transfer the purchase to the person for whom he bought. To pretend that, by causing the instrument of sale to be executed in his name, he must be considered as the owner, because it so appears on the face of the instrument, is to misunderstand the rule by which parol evidence is made inadmissible against or beyond the contents of a written act. No such thing is attempted here as contradicting the contents of the act; the plaintiff admits the whole of it; but he says that, no such act ought

to have been executed to the defendant in his own name, because he purchased as agent; and he says that after having caused the instrument to be so made, he is bound to transfer the property to his principal.

The defendant is equally mistaken, when he thinks that the plaintiff can demand nothing more of him than a compensation in damages. Such indemnity is due by the agent in cases of nonfeasance or misfeasance through neglect; but, when the obligation of the agent has been fulfilled in part, and it is in his power to fulfil it altogether, the principal has a right to require the contract to be carried into effect to the end.

The plaintiff, in the course of the trial below, had prayed leave to discontinue, and entered a bill of exceptions against the refusal of the judge to grant his request. But being of opinion that he must succeed as the case now stands, we deemed it useless to investigate that question.

It is adjudged and decreed, that the judgment of the district court be reversed; and this court proceeding to give such judgment as ought to have been rendered below, do order and decree that the plaintiff and appellant do recover from the appellee the tract of land in contro-

West. District *Sept.* 1819.

HALL vs. SPRAGG.

versy, and, that the appellee do transfer and convey the same to him; and it is further ordered that the appellee do pay costs.

Wilson for the plaintiff, *Baldwin* for the defendant.

PHILLIPS vs. *CARSON*.

Payment, of money due to an estate, to a person authorized at the time to receive the debts, is valid and extinguishes the obligation.

APPEAL from the court of the sixth district.

MARTIN, J. delivered the opinion of the court. This case differs from that of *Phillips* vs *Johnson & al.* determined in August last, *ante*, 236, in this circumstance only—that the payment to James Rogers was made on the 1st of July, 1816, that is to say, after the judgment of the district court, but before the expiration of the time during which an appeal suspending the execution might have been obtained.

We are of opinion that this circumstance does not vary the rights of the parties. No appeal, suspending the execution, was taken; and Rogers was the only person in whose hands the judgment against the present defendant, in favor of the estate, could be paid, from the date of the judgment of the district court the 22d of June, 1816, until the term of this court, in Octo-

ber, 1818, when it was reversed. 5 *Martin*, 700. During this period of upwards of two years the payment made to Rogers could not be legally recalled. It, therefore, extinguished the debt. The debt once extinguished cannot be said to have been revived by a judgment of this court, to which the present defendant was not a party.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Baldwin for the plaintiff. *Johnson* for the defendant.

PHILLIPS vs. *SACKETT.*

APPEAL from the court of the sixth district.

A debt is extinguished when the amount of it reaches the hands of the person authorised to receive it at the time.

MARTIN, J. delivered the opinion of the court. This case is perfectly similar to those of *Phillips vs. Curtis* and *Phillips vs. Fulton's heirs*, just determined, *ante*, 237, 241

The defendant's debt to the estate of the late A. Phillips was extinguished: the amount of it having reached the hands of the only person authorised to receive it at the time.

It is, therefore, ordered, adjudged and decreed,

West. District. *Sept.* 1819.

PHILLIPS vs. SACKETT.

that the judgment of the district court be affirmed with costs.

Baldwin for the plaintiff, *Johnson* for the defendant.

*** MATHEWS, J. was prevented by indisposition from attending in the western district this year.

Owing to a raging epidemy, the October term was not holden.

There was not any case determined in November term.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT, DECEMBER TERM, 1819.

East'n. District. *Dec.* 1819.

LLOYD vs. M'MASTERS & AL.

LLOYD vs. M'MASTERS & AL.

The petition stated, that the plaintiff lent the defendant, M'Masters, 12,000 dollars, for the purpose of fitting out his ship, and received for the security of the loan a mortgage and hypothecation of her; that $5865, 61 of the said sum remain due and unpaid—he obtained a provisory writ of seizure, and prayed judgment against M'Masters.

If a ship be hypothecated for a sum lent to fit her out on a voyage to Liverpool, to become payable on her arrival and the freight is to be received by the lender, who is authorised to insure, &c. and it is provided that the borrower shall be liable for all expenses and in the mean,

The deed of hypothecation, annexed to the petition, provided that the ship should proceed to Liverpool, and be consigned to Barclay, Salkeld

East'n. District. *Dec.* 1819.

LLOYD *vs.* M'MASTERS & AL.

while the ship be sold, she will not be liable in the hands of the latter, for the expenses of the homeward voyage.

and co., and on her arrival there the said sum of 12,000 dollars should become due and payable; and the ship with her appurtenances and the whole freight, accruing or to accrue on the voyage, were to be bound for the loan: all disbursements, commission, costs and charges, whatever incurred and necessary on said vessel or her freight on the intended voyage, either at New-Orleans or Liverpool, to be borne by M'Masters; with all costs of exchange, as well as those of effecting insurance, which the plaintiff was authorised to procure. He was further authorised, by himself or assigns, to collect the freight and place it to M'Master's credit, in liquidation of the said 12,000 dollars and expenses aforesaid. Further, it was agreed that the ship and her appurtenances should remain liable till full payment was made.

The ship having in the mean while been sold by M'Masters to James Martin, subject to the hypothecation, the latter was made a defendant.

M'Masters pleaded the general issue.

Martin pleaded his property in the ship; that the hypothecation was invalid, and that, if it was valid, for a part of the claim, that part was paid. He further pleaded the general issue.

It appeared in evidence, that the plaintiff's

claim was composed of three items, viz; the sum loaned and interest—the expenses of the ship till her cargo was unloaded at Liverpool and the freight received—lastly, the expenses in Liverpool in preparing for her return voyage.

The district court was of opinion, that the hypothecation of the ship extended only to the security of such expenses as were incurred on the outward voyage, ending when the ship was unladen at Liverpool, and that any expenses incurred afterwards were not covered by the deed of hypothecation: and gave judgment for these expenses only, amounting to $537, 38. The plaintiff appealed.

Workman, for the defendants. Is the act of hypothecation, on which this action is founded, a valid one?—This, to say the least, is very doubtful. When a vessel is pledged by the owners, it is called an hypothecation: when by the master a bottomry. But no other distinction, than in name, exists between those contracts. Whatever is necessary in a bottomry made by the master, is indispensable in every hypothecation made by the owners.

One of the essential conditions of every such contract is a stipulation that the debt shall be discharged and annulled, if the vessel be lost,

East'n. District
Dec. 1819.

LLOYD
vs
M'MASTERS
& AL.

Such a clause is found in every bottomry bond or bill to be met with in the books of precedents. Without such a clause it is expressly declared by the best authorities that the bond would be void. *Abbot, American Edit.* 98. *Park*, 410. *Jacobson*, 11.

But the instrument on which this suit is founded contains no such condition or stipulation. Therefore it is void as a maritime hypothecation. The *bonâ fide* third possessor, Martin, cannot be affected by it; and the plaintiff must be left to his recourse against the defendant M'Masters, as for a mere personal obligation.

We may test this opinion unequivocally, by the following case: suppose this vessel, the Ajax, had been lost in her voyage to Liverpool? If the hypothecation be a good one, the debt would then of course be annihilated. But, what is there in the deed which could lead to such a conclusion? Not a word: nor can its silence be supplied by any inference. Were an action, after the loss of the vessel, to be brought against M'Masters, by the plaintiff for the money, advanced by him, could he be told that the debt was extinguished? He would reply, with the instrument in his hand, that it contained no such provision; but that though void as a

maritime hypothecation, it was still valid and binding as a personal contract.

If the hypothecation were a valid one, the debt secured by it must be considered as destroyed, to within a very small amount. That hypothecation was made to secure a debt of 18,000 dollars. Now by the account annexed to the plaintiff's petition, it appears, from the three articles on the creditor's side, that the plaintiff has already received the sum of 11,055 dollars, 75 cents, the amount of freight, &c. These payments must first be imputed to the debt secured by mortgage before they can be applied to the chirographical or simple contract debts, according to the well known maxims of the civil law, explained and illustrated by 2 *Pothier's Obligations, n.* 530; and recog nised and reinforced by our statute. *Civ. Code,* 290, *art.* 156. But it appears on record, from the testimony of Capt. Carson, that a large portion of the expenses of the vessel at Liverpool with which the defendants are charged, were incurred and disbursed for the sole purpose of fitting and preparing the vessel for her homeward passage from Liverpool to New-Orleans. Whereas the contract of hypothecation, or whatever it may be, stipulates only for a voyage from New-Orleans to Liverpool. The words of the

East'n. District
Dec. 1819.

LLOYD
vs.
M'MASTERS
& AL.

deed, (near the commencement) are "in order to enable him to fit out and provide said vessel for an intended voyage to the port of Liverpool."

Surely a contract made for the purpose of securing the expenses to be incurred on such a voyage cannot be extended to secure the expenses disbursed for any other and subsequent voyage. Were then both the preceding points to be decided against the defendants they would evidently be entitled, on this last ground, to an affirmance of the judgment of the court below. It was in fact upon this ground that the judgment of that court was rendered.

Grymes, for the plaintiff. The objection, taken by the defendant to the validity of the hypothecation by the owner, is certainly without foundation.

There is no distinction more clearly established than that which exists between a simple loan and a maritime loan on bottomry, or *respondentia*.

In the first case the money is at the risk of the borrower, and only legal interest can be reserved. In the second, it is at the risk of the lender, and marine interest to an indefinite amount may be reserved as a compensation for that risk, and can only be resorted to in case of

great necessity. 2 *Mars. on Ins.* 736, 748, 9. 741 (*in note*) *Emerigon (Hall's translation)* 36.

But both description of loans are equally susceptible of being secured by hypothecation.

Mortgages upon ships are familiarly spoken of in all the books. 8 *Johns. Rep.* 159. *Lex. Merc. Am.* 73, 4. *Emerigon (Hall's translation)* 217. *Id. (in note.)*

In all the cases referred to, mortgages to secure simple loans or pre-existing debts are alluded to because they speak of prior mortgages having the preference, which could not be in respect to marine loans or bottomry; because in such cases the last lender is preferred on the principle that he furnishes money to preserve the common pledge. *Wesket on Ins.* 56.

By the laws of Spain, every thing that is a subject of commerce, and in which a man had any property can be hypothecated. *Febrero Escrib. n.* 57; and our own statute, in exempting personal property from mortgage, specially exempts ships and vessels. *Civ. Code*, 455, *art.* 88; and by the Roman law, the very act of lending money for the outfit of a ship created a loan.

Inquiry, upon this subject, however, may be superfluous, as the district court has by its judgment supported the validity of the mortgage,

East'n. District. *Dec.* 1819.

LLOYD *vs.* M'MASTERS & AL.

and reduced the plaintiff's claim by a construction of the instrument; and from this judgment the defendants have not appealed,

It then only remains to examine the second point made by the defendants, upon the construction of the act itself: and in doing this, it will be necessary to lose sight of the defendant, Martin, and first, see how the instrument would stand between the plaintiff and the defendant M'Masters, the mortgagee and mortgagor.

It appears that the ship arrived at the port of Liverpool, in the voyage mentioned in the act of hypothecation. That the freight was received by the consignees; a large portion of it applied to the use of the ship in paying the necessary port charges, &c. and the balance carried to the credit of the plaintiff's debt.

The defendants contend, that after paying the charges alone necessary to get her into port and discharge her cargo, that all the rest should have been applied to the extinguishment of the hypothecary debt; and they cite Pothier and our code. But the irrelevancy of these authorities becomes obvious from the least attention. They are based upon the supposition of the existence of several debts due by the same debtor, to the same creditor; here there was but the

one debt existing between them, and the expenses of the ship while on voyage were necessary to the preservation of the thing hypothecated: incidental to its nature are the freight, the most natural and proper fund for supporting it. *See judge Washington's opinion, in note, 2 Mar. on In.* 741, and the payment was for the mutual advantage of mortgagor and mortgagee.

But supposing the principles quoted from *Pothier* and the *Civil Code* to be applicable, and, that this case is to be tested by them, the result must be the same.

Pothier says that, when imputation is neither made by the debtor nor the creditor, it ought to be made to that debt which it is most for the interest of the debtor to pay. The Code says the same. Compare it with the circumstances of this case. The ship Ajax is an American ship; she is described in the act of hypothecation as the ship Ajax of this port, New-Orleans. The master, in his testimony tells us that M'Masters gave him no instructions to apply elsewhere for money, for the use of the ship, while in Liverpool, or to bring her home, but to the consignees, Barclay, Salkeld & co. and that he does not think he could have procured money in Liverpool on M'Masters' or any other

East'n. District
Dec. 1819.

LLOYD
vs.
M'MASTERS
& AL.

person's personal credit. It does not appear that M'Masters had any other fund in Barclay, Salkeld & co's. hands, but that arising from the freight earned by the ship. It is clear he had not, because if he had, Barclay, Salkeld & co. who were the agents of the plaintiff, would have preferred extinguishing his debt and charging the disbursements to M'Masters' account, than to appropriate the fund hypothecated for the plaintiff's reimbursement. And it is no where pretended or alledged that he (M'Masters) had any such funds.

In this state of things, either the ship must have remained in the port of Liverpool, perished, or be seized and sold for the debts contracted there; or the master must have raised money by bottomry or pledge of the ship, and subjected the owner (the defendant M'Masters) to a heavy marine interest. The plaintiff's debt bore no interest; none is reserved in the act.

Hence the inference is clear, that it was most for the interest of the debtor that the freight should be first applied to the payment of the ship's disbursements than to the extinguishment of the plaintiff's debt.

It would have been improper, and an act of bad faith, on the part of the consignees to have, with this freight in their hands, driven the mas-

ter to such extremities, they being the agents of both parties and bound to protect the interest of both. *Washington's opin. 2 Mar. on Ins. 741. (in note.)*

The plaintiff cannot be accused of making this application of the freight from interested views, or from a disposition to injure the interest of the defendant. His debt was payable in Liverpool, it was manifestly his interest to have it paid there, and as soon as possible; for as has been shewn he was receiving no interest for the protracted payment. According to the defendant's own doctrine he might have seized upon the freight appropriated to the discharge of his debt, and left the ship to provide for herself in a foreign port.

He has furnished the means of bringing her home in a state of present usefulness, a capacity to earn future freights; at the risk of losing his security by perils of the sea, without any interest for the delay or compensation for the risk; and this is alledged as a reason why he should not now recover his just debt; and this reason is urged by the defendant M'Masters, who alone has profited by it.

But the purposes for which this money was borrowed, as set forth in the act of hypothecation, are invoked to the defendant's aid. It is said

East'n. District. *Dec.* 1819.

LLOYD vs. M'MASTERS & AL.

to be to enable him to fit her out on a voyage to Liverpool. It is totally immaterial for what purposes he borrowed the money; it was unnecessary to state it in the deed.

He borrowed it on the pledge of the ship; if he afterwards chose to send her to Liverpool he must pay the expenses of the voyage, and whether he sent money to pay with, or whether he borrowed it there, or whether paid out of the freight, ought to be totally immaterial to him, as he was to pay at all events; he had the whole control of the ship, she was in his possession, and if, after the loan and hypothecation, he had ordered the captain to go to China, instead of Liverpool, we might with the same propriety be told that the mortgage was cancelled, because she never went on the voyage mentioned.

The defendant has totally failed to shew that he has received any injury whatever, from the manner in which the freight money was applied; there is, therefore, no principle of equity that can entitle him to be sustained in the ground he now takes.

The intention of the parties, as it is fairly to be gathered from the act, has been fully complied with.

It is there stipulated "that all disbursements, commissions, costs and charges which shall be

incurred by him, or be necessary to the said vessel on her freight on said intended voyage, either in this port or in the port of Liverpool, aforesaid, shall be borne," &c. Again, "the said George Lloyd or his assigns are hereby fully authorized to collect the said freight, and to place the same to the credit of Samuel M'Masters in liquidation of the said $12,000 and expenses aforesaid." The words of the first clause are sufficiently ample to cover all the expenses of the ship, incident to her entering the port, and while she was there, and in the second the appropriation of the freight to that purpose is expressed; that the parties so intended it is evident, not only from the whole tenor of the circumstances heretofore detailed, but it comes more clear as we advance with the instrument itself. It will be observed, that in the clause, immediately preceding the first above quoted, the ship and freight are clearly pledged and hypothecated for the payment of the loan, and this was amply sufficient for all the purposes of the parties, if they contemplated the application of the whole freight to this debt and its extinguishment at Liverpool. But, in the clause immediately succeeding the one last quoted, it is said (and lastly, &c.) "the said ship shall be at all times liable to and chargeable for the pay-

East'n District. Dec. 1819.

LLOYD vs. M'MASTERS & AL.

ment of the said 12,000 dollars until full payment is made."

From this, it is clear, that the parties contemplated a balance would be due, after appropriating the freight that could be spared from the expenses. That they contemplated the ship's return from this voyage, and her being at all times and places, where found, bound for that balance; and, that the defendant, M'Masters, could not have contemplated being left to provide money for her maintenance while in Liverpool, and bring her home from other sources; because it is in evidence, that he made no such provision, nor can it be presumed that the plaintiff could have contemplated the necessity of such provision, since it could only be procured to his great injury, weakening his security by incumbering the ship with a bottomry which would take precedence of his mortgage for the amount of the sum necessary, with the addition of a heavy marine interest.—All contracts of this nature are to have a favourable construction, and where there is obscurity, such as will best answer the intentions of the parties. *Wesket on Ins.* 130. All promises are to be taken most strongly against the promisor. *Ib.*

The only remaining subject of discussion is, as to the rights of Martin, the other defendant,

who claims this ship under a purchase from M'Masters, the other defendant.

The facts are these: the act of hypothecation from M'Masters to the plaintiff, is dated June the 8th, 1819; at this time M'Masters was the sole owner, Martin had no interest whatever. On the 16th of April, 1819, Martin purchased of M'Masters for the price of $4000. The only circumstance that could possibly give him any equitable right to interfere, or insist upon a different construction of the instrument from that which it ought to have between the original parties, would be a want of notice.

This is completely taken from him, on the exhibition of his own bill of sale, the instrument under which he claims, by the last clause in which he expressly agrees to take the ship subject to this mortgage and the amount, the date, the place of enregistry, and all are recited. He lives in the same town with the plaintiff, and could in five minutes have learnt from him the nature of all the transactions, and the amount of his claims against the ship: by completing the purchase under these circumstances, he has subjected himself to all the equity existing between M'Masters and the plaintiff, and there is strong reason to believe he was fully acquainted with the amount of plaintiff's demands

East'n. District
Dec. 1819.

LLOYD
vs.
M'MASTERS
& AL.

when we find him giving only 4000 dollars for a ship deemed worth 12,000 not a year before.

The amount of the loan being certain, the money paid by the plaintiff for disbursements, &c. being admitted and proved, as stated in his account annexed to his petition, the result is, that if the law be with him he is entitled to a judgment for $5685,61.

Workman, in reply. In the present stage of this cause, this court may undoubtedly render such a judgment in it as they think the district court ought to have done. The whole case being before them, they are authorized, by the equitable and liberal provisions of the statute, to do complete justice between the parties.

The plaintiff's attempt to distinguish the hypothecation in question from the contract of bottomry, will be defeated, by the account which he himself has presented, annexed to his petition. From that account it is seen that no more than 11,000 dollars were actually paid to M'Masters on account of the 12,000 dollars for which he mortgaged the vessel. It also appears that the plaintiff was to charge the enormous commission, on the advance and freight, of seven and a half per cent. These two circum-

stances would by themselves form a considerable maritime usury, and give to the instrument the decided character of a bottomry bond: but these circumstances are not all: for it further appears, that the defendant was to be charged with the full amount of the insurance of the vessel; which from New-Orleans to Liverpool is generally, I believe in time of peace, from about 4 to 5 per cent. This, for a period of two months, would amount to from 24 to 30 per cent. per annum, the ordinary rate of maritime usury. Maritime interest is allowed in these contracts chiefly as a compensation for the lender's risk of losing the whole loan, if the vessel should be lost. And whether he takes this interest at a fixed rate, and becomes his own insurer, or charges the premium of insurance to the borrower, is to the borrower immaterial. Perhaps indeed the borrower may be a loser, by stipulating to pay the insurance instead of the nautical usury. If, in the present case, for example, a war had broke out between the United States and any European power, the premium of insurance would probably have been increased far beyond the highest rate of maritime interest at this port when the vessel sailed.—Add this stipulation

East'n. District. Dec. 1819.

LLOYD vs. M'MASTERS & AL.

to the defalcation of one thousand dollars from the money supposed to be advanced, and the exhorbitant commission, and the result will be a more extravagant allowance for maritime usury than often occurs in this or any other maritime place. And yet the plaintiff contends that he is entitled to all these advantages without being liable to any of the risks for which such advantages can be lawfully stipulated.—If this be, as the plaintiff contends, a simple hypothecation, to secure money lent, it is void for gross usury. If it be a contract of bottomry, it is void, as I have before stated, for want of the stipulation that the debt should be discharged if the vessel were lost.

On the second point, I still contend that the rule of law is general and absolute; to wit, that payments, made generally on account, must be imputed to hypothecary, rather than to chirography debts. The particular circumstances which might perhaps form an exception to this rule, in the case of M'Masters, as stated by the counsel are not applicable to the defendant Martin, who bought the Ajax, subject only to the liens legally imposed by, or arising from the deed on which the plaintiff sues.

On the remaining question, respecting the expenses of fitting the vessel for her return

voyage, the principle on which the district court has determined is so clear and correct, that it is deemed unnecessary to trouble the court further on that subject.

MARTIN, J. delivered the opinion of the court. The testimony and documents, which come up with the record, establish the quantum of the plaintiff's claim. Indeed, that does not appear to be disputed, and the contest is only as to the right of hypothecation.

With regard to the defendant, M'Masters, the district court certainly erred in withholding from the plaintiff a judgment for that sum; and its judgment is, therefore, annulled, avoided and reversed.

Proceeding to inquire what judgment ought to have been given in the district court, as to the claim of hypothecation, we cannot admit the position of the defendants' counsel, that the deed of hypothecation is void on account of the absence of a clause, providing that the debt shall not be demanded, but held to be extinguished in case of the loss of the ship: but we think with him and the district court that the hypothecation claim does not extend to the expenses of the outward voyage. When, by the collection of the freight, the sum loaned was paid in whole

East'n District Dec. 1819.

LLOYD vs. M'MASTERS & AL.

or in part, the hypothecation was in like manner destroyed, and could not be revived by subsequent disbursements.

It is, therefore, ordered, adjudged and decreed, that the plaintiff do recover from the defendant, M'Masters, the sum of five thousand eight hundred and sixty five dollars, and sixty one cents; and that the ship Ajax be sold to satisfy the sum of five hundred and thirty seven dollars, and thirty eight cents, the balance of the sum borrowed, and the expenses of the outward voyage, as part of the aforesaid sum, with costs of suit in this and the district court.

DUBOURG & AL. vs. ANDERSON.

If the return of a note be specifically prayed for, with general relief, the court will decree the payment of its amount, with a proviso that it may be satisfied by the return of the note.

APPEAL from the court of the second district.

The petition stated that the defendant is indebted to the plaintiffs, in the sum of 350 dollars, with damage for the following cause, viz; that in March, 1818, they purchased from him fifty barrels of molasses, which he assured them he had on a plantation which he had lately sold, and gave to them an order therefore on his vendee, taking their notes for the said sum; that on application to the latter person, the plain-

tiffs found that the defendant had not any molasses at the said plantation. The petition concluded with a prayer that the defendant might be decreed to return the plaintiffs' note, and, that they might have other and further relief.

The defendant was required to answer on oath to two interrogatories: 1. Whether the name of J. Anderson, at the foot of the order for the delivery of the molasses, was not written by him?—2d, Whether he did not receive the plaintiffs' note for 350 dollars, in payment of the molasses mentioned in the order?

He pleaded the general issue. He answered the first interrogatory in the affirmative: to the second, he answered that he received the plaintiffs' note, there mentioned, for all the molasses remaining in the cisterns of the plantation, after one of the plaintiffs had sent a young man to examine the molasses.

There was a verdict and judgment for the plaintiffs for 350 dollars, and costs.

The defendant appealed.

With the record came up copies of all the testimony, taken by the district court, and a bill of exceptions.

This bill stated, that the plaintiffs having closed their testimony, and the defendant hav-

E. D. Dec. 1819.

Duncan & al. vs. Anderson.

ing read his answer, he attempted to read his answers to the interrogatories put to him by the plaintiffs, when the latter stopped him, and moved the court to strike off the latter part of the answer to the second interrogatory, as not being responsive thereto, but the allegation of a separate and independent fact, not called for in the interrogatory. This was opposed on two grounds, that a motion to strike off part of the answer to an interrogatory must be made in writing within three days after the answer is filed, and, that the part prayed to be struck off was pertinent. But the court sustained the motion, holding that there is a material difference between an insufficient answer, and one which proceeds to allodge a separate and independent fact, not called for in the interrogatory; that in the latter case the motion may be made orally and during the trial.

Ory deposed that he was present when the parties contracted for the sale of a quantity of molasses, which the defendant said he had in his cisterns, averring that there were not less than forty, and he believed at least, fifty barrels.

Lawrence said he purchased Anderson's plantation, and took possession of it in March, 1818, when there were not more than sixty or seventy gallons of molasses in the cisterns, and

the same quantity was still there in March following, when one of the plaintiffs came to receive it, that this quantity was in one of the cisterns, and in the other there was nothing but some very dirty syrop, which was not worth any thing; that the cisterns were good; and he does not think that the molasses could have been wasted or lost, in the least degree, between the time he took possession of the plantation, and that when Chapdell came for the molasses.

Manade deposed, that he is a sugar maker by profession; and, at the request of the plaintiffs, he went with A. Duplantier to examine the quantity and quality of some molasses, purchased by them from the defendant, that, in the sugar house, he found in the upper cistern about sixty gallons of molasses, and in the lower, a small quantity of dirty, black looking, water, which was neither syrop nor molasses, and worth nothing.

A special error was assigned by the counsel of the defendant, and appellant, viz: that the prayer of the petition is for a special performance, and the judgment for a sum of money.

Derbigny, J. delivered the opinion of the court. The defendant having sold to the plaintiffs a quantity of molasses, represented to be not

Eas't'n. District
Dec. 1819.

DUBOURG & al.
vs.
ANDERSON.

less than forty barrels. They gave him in payment their negociable note of hand for the sum of 350 dollars. But having found, when they went to receive the molasses, that it fell short of the quantity represented, they refused to take it, and brought the present suit against him to obtain restitution of their note. They further ask for such other relief as equity and justice may demand It is in proof, that instead of forty barrels, the quantity of the molases was not more than fifty or sixty gallons; so that there was evidently error or fraud in this transaction. But the appellant relies on other grounds of defence. In the first place, he complains that one of his answers to the interrogations propounded to him was not admitted to its full extent, and that a part of it was improperly struck off as irrelevant. But we are of opinion, that had this answer been received unconditionally, it contains nothing that could avail him. We therefore think it useless to examine whether the part struck off was or was not pertinent; because, should we find that it was, we would not send the case back to be tried anew, with the addition of evidence which we deem insignificant.

The appellant further contends that the judgment of the district court is wrong and ought to be reversed, because it awards to the appellees

that which they did not ask for; the petition praying for the restitution of the note, and the judgment decreeing payment of a sum of money. We think with the appellant that the judgment ought to have been for the thing prayed for; but in awarding the restitution of a note of hand, which the plaintiffs are liable to pay, if not returned, the court had a right further to provide that, in defect of such restitution, the amount of the note should be paid. At any rate, the prayer for general relief surely embraced that additional remedy.

It is, therefore, ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed; and this court, proceeding to render such judgment as they think ought to have been given below, do order, adjudge and decree that the appellant shall pay to the appellees the sum of three hundred and fifty dollars, which payment may be satisfied by the surrender of the note sued for; it is further ordered that the defendant pay costs.

Grymes and *Canonge* for the plaintiffs, *Livermore* and *Eustis* for the defendant.

East'n. District
Dec. 1819.

ABAT & AL. vs. SONGY'S ESTATE.

Where a court has no jurisdiction over the *subject* of the suit, no admission of the parties can give it.

The jurisdiction of a court of probates extends over the acts of persons appointed under its authority; but not over claims against the estates which they administer.

ABAT & AL. vs. SONGY'S ESTATE.

APPEAL from the court of probates of the parish of Orleans.

DERBIGNY, J. delivered the opinion of the court. The petitioners were joint owners of the brig Olivia, with the late Vincent Songy, who was, at the same time, captain of that vessel. Songy, had been with the brig at Santiago de Cuba, where he transacted the business of the concern, and was on his return to this port, when he died. The petitioners, having to settle accounts with his estate, and to claim their share of the property which Songy had managed for their joint concern, sued his curator in the parish court; but the judge, being of opinion that the cognizance of the case more properly belonged to the court of probates, ordered the removal of it into that court; and both parties having acquiesced, the cause was there investigated and tried.

From the judgment, which was rendered by that court, the petitioners have appealed; and the first error which they assign is, that the court acted without jurisdiction. It is objected to them that they submitted voluntarily to the decree of the removal, and carried on the suit

through all its stages to the end, without ever objecting to the jurisdiction of the court; but to this, they answer, that if the court had no jurisdiction over the subject, no submission of the suitors could give it any.

The appellants being certainly correct in this position, it remains to inquire whether the court of probates had or had not any jurisdiction over the case.

It is to be regretted that the nature and extent of the jurisdiction of courts of probates, in this state, should not be better defined and more precisely determined. In its present unsettledness, it seems to be generally supposed that it does not extend to the cognizance of any suit or litigious claim; but to lay that as a general rule is, we apprehend, incorrect; for there are cases where such cognizance is expressly given to them.

These courts were created in 1805, with very limited powers, indeed, none else than proving wills, delivering letters testamentary, and appointing administrators to the estates of persons deceased intestate. Afterwards, although no subsequent law had intervened, they were recognised in our code to have other powers, such as the appointment, confirmation, removal or discharge of testamentary executors, tutors and

Eastn. District. Dec. 1819.

ABAT & AL. vs. SOMOT'S ESTATE

curators of minors, interdicted and absent persons, the settlement of the accounts of these administrators, the inventory, appraisement and sales of estates, where absent heirs are interested, and generally all judicial acts relative to said persons, and to the administration of their property. Of these powers some are purely ministerial or administrative; but others carry with them, of necessity, the cognizance of suits or judicial contests. For example, an application for the destitution of a tutor is certainly a suit, and one indeed which may involve the parties in most serious litigation. There the court of probates is vested with full power to decide upon a legal controversy; so in a contest where opposition is made to the discharge of a tutor or a curator; so where they are called upon by the heir or other owner to render their accounts, and pay the balance; and so in many other cases which may arise under the jurisdiction of the probate court. Hence, it has been thought by some, that when a demand is directed against a tutor, curator, or any other administrator, subject to the control of the court of probates, that is the proper tribunal where application is to be made. The distinction, however, may be easily drawn between those demands which are directed against an administrator for

the acts of his administration, and the claims which are brought against the estate which he represents. The first are cognizable by the probate courts, the others not. In other words, the jurisdiction of a court of probates extends over the acts of the persons appointed under its authority; for those acts they are accountable before it; but where the contest is between the estate and some other party, that court is without jurisdiction.

The present case being evidently a litigious controversy between the partners of the late Songy on the one part, and his estate on the other, we are bound to say that the court of probates had no jurisdiction over it, and to avoid the judgment which it has rendered.

It is, therefore, ordered, adjudged and decreed, that the judgment of the court of probates of New-Orleans, rendered in this case, be annulled, avoided and reversed, and that each party pay his costs in both courts.

Seghers for the plaintiffs, *Carleton* for the defendants.

East'n. District. Dec. 1819.

BERNADON vs. NOLTE & AL.

BERNADON vs. NOLTE & AL.

If the freighter refuse to receive goods, on the ground that they are damaged, and the master say they may be received and the matter will be settled, the freighter may stop the freight till an allowance be made for the damage.

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court. The petition states that the defendants are indebted to the plaintiff, in the sum of $383, 58, for freight of a quantity of coffee, by them shipped on board of the plaintiff's vessel in the Havanna, for New-Orleans, which was accordingly brought into the latter port and delivered to the defendants, who accepted the same, and refuse to pay the freight.

The answer sets forth that part of the coffee, mentioned in the petition, viz. 25 bags belonged to the defendants, was so much injured in the transportation, as to occasion a damage amounting within twenty six dollars to the freight claimed; and the rest amounting to 47 bags, was so much injured in the transportation, as to occasion a loss of $253, 05 more than the amount of the freight claimed therefor; further, that the said 72 bags of coffee were not delivered in the like good order in which they were shipped, and great damage was occasioned thereto by the fault and negligence of the master of said vessel, or by the defects of said vessel.

The district judge gave judgment for the defendants; and the plaintiff appealed.

Our attention is first drawn to the absence of any of the reasons, and of the citation of any law, on which this judgment was rendered; wherefore, it is ordered, adjudged and decreed, that the judgment, being contrary to the constitution, and the act of the legislature, be annulled, avoided and reversed.

Proceeding to inquire what judgment the district court ought to have rendered, we find the testimony in the case spread on the record.

Baldwin, the weigh master of the custom house, deposed that he weighed the coffee that came in the plaintiff's vessel, and observed that 20 bags of it belonging to the defendants were damaged and when he returned from dinner he took notice that some of the coffee which he had weighed in the morning remained on the levee. On his cross examination, he added, that he knows of no coffee rem ,ning at night; that he saw some one evening pretty late. Two days it rained, while he was at dinner; but the coffee was removed before he returned. The 20 bags he speaks of, as damaged, were sent to the defendants' store. The captain observed that some of the coffee was damaged, but he could not ac-

East'n District. Dec. 1819.

BERNARDON vs. NOTTE & AL.

count for it. He returned the 20 bags to the collector as damaged, and told him he did not observe that the rest of the coffee, returned as damaged, was so. This was after the survey. There were four or five bags damaged belonging to Brandegee, who received 119, and 33 bags of coffee in good order, except a few bags which were partially damaged.

Barker, a witness for the defendants, superintended the lading of the coffee in the Havanna; it was in good order; some of the bags were torn, and others clumsily put up; but the coffee was perfectly good and dry. When it arrived in New-Orleans he took notice that some damaged bags were landed, and expostulated with the captain on the impropriety of landing such bags without a survey, and was answered, that it was presumed to be of no consequence, and, that the damage must have happened when the vessel was driven ashore in the hurricane. He inquired why a protest was not made, and the captain answered he did not believe it to be very important, but he had written to his consignee to have a protest noted, and send down a surveyor. The captain once told the witness the coffee was wet when it came on board; and being asked why he signed the bill of lading, made no reply. The defendants sold 30 bags of

the coffee to Lieutaud, brothers & Delhonde, which they took from the levee as it was landed; and immediately sent word that the coffee was damaged. On receiving this message, the witness went down and found it so; though, from the looks of the bags, he could not have supposed it. He took the thirty bags, and gave others from another vessel. The whole was not then landed. The captain and consignees were desired to come to the defendants' store to view the damaged coffee. The captain did not come, but the witness believes that Price did, in behalf of M'Lanahan & Bogart, the consignees.

Lieutaud confirmed what was said by Barker, as to the thirty bags bought by Lieutaud, brothers & Delhonde.

Collins, a clerk of the defendants deposed that, he received the coffee from the plaintiff's ship, that the landing of it began on the 28th of June; three days after, he discovered that some of it was damaged. He requested the captain to take it back, who replied "it was all one; the defendants might go on and receive the coffee, and they would settle afterwards." After reporting this to the defendants, he continued to receive the coffee, which lasted till the 3d of July.

It was admitted that R. D. Sheppard & co,

East'n. District *Dec.* 1819.

BERNADOU vs. NOLTE & AL.

received 14 bags of coffee by the same vessel, not damaged; nine of them being taken out on the first, the rest on the second day of the discharging.—That Gordon, Grant & co. received 15 bags not damaged; a part of them being landed at the same time with the defendants' coffee. That J. Hagan received 19 bags; and M'Lanahan & Bogart about 20, which were not damaged.

Proof was exhibited by witnesses and documents, that the loss sustained by the damage of the coffee was, at least, equal to the freight claimed.

It appears, from the testimony of Barker, that the coffee was delivered in the Havanna, in good order; and by that of Collins and Lieutaud that a considerable part of it was damaged at the time it was delivered in New-Orleans; but the petition alledges that the defendants received and accepted the coffee; which if not accounted for must prevent the defendants from opposing the ill state in which the coffee was delivered, as a bar or set off against the claim for freight; but Collins deposes, that on his objecting to receive any more coffee, and desiring that the damaged bags might be taken on board again, the master observed, that the delivery might continue, the coffee be landed, carried to the store of the defendants, and the matter would

afterwards be settled. This, in our opinion, qualifies the receipt and acceptance of the coffee, and authorizes the defendants to claim a settlement afterwards: and if they can shew that the coffee was damaged, in such a manner as to have authorized them to refuse receiving it without an allowance being made to them, they may now indemnify themselves by retaining the freight, if they shew injury equal to its amount.

The testimony of Baldwin, the weighmaster, raises but a small presumption of the coffee having been wet by a protracted exposure to the rain, after its landing, which is not sufficiently encreased by the outward appearance of the bags inducing a belief that the coffee was sound, nor by the coffee of the other shippers not being damaged.

When goods are shewn to have been delivered in good order, and are landed otherwise, the fact is evident that the deterioration happened on board; and as the master is able to shew the cause of this deterioration, the presumption of the law is, that when he does not exhibit proof of this cause, that his neglect occasioned the deterioration. In this case there has been on the part of the plaintiff, or his agent, such a gross neglect of the means which the law and custom

East'n. District. Dec. 1819.

BERNADON vs. NOLTE & AL.

point out, in order to establish a deterioration of merchandize by any of these causes, for which the owner and master cannot be made liable, that he cannot be permitted to recover.

It is, therefore, ordered, adjudged and decreed, that there be judgment for the defendants, with costs of suit in the district court; but the judgment of that court being reversed in this, they must pay the costs of the appeal.

Livermore for the plaintiff, *Livingston* for the defendants.

JENKINSON vs. *COPE'S EX'RS.*

A thing deposited, must be returned to the depositor, and the owner of it, if the deposit be not made in his name, has no action to recover it without a cession of the depositor's rights.

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court. The petition states that Hiram Edmundson, the patroon of the plaintiff's barge, having in that capacity received 400 dollars for and on account of the plaintiff, deposited them with the defendants' testator for safe keeping. That the testator died without having refunded the said sum to the said Hiram. The defendants pleaded the general issue; there was judgment for the plaintiff, and they appealed.

The testimony, which is all spread on the

record, although it does not leave the question of fact absolutely clear of doubt, preponderates in favor of the plaintiff: but the defendants' counsel assigns as an error of law, that it is not stated that the money specified in the petition was deposited for and on account of the plaintiff, and the testimony shews that the name of the plaintiff was never mentioned to the depositary, who to his death believed the money belonged to Edmundson.

It appears to us that the defendants' counsel is correct, and that the district judge erred in giving judgment for the plaintiff, who had no right to demand the money from the defendants, until he had obtained a cession of Edmundson's right, or had established his claim in a suit to which the latter was made a party.

The depositary must return the thing deposited only to him who deposited it, or in whose name the deposit was made, or who was pointed out to receive it. He cannot require him who made the deposit to prove that he is the owner of the thing. Yet, if he discover that the thing was stolen, and who the owner of it is, he must give him notice of the deposit, requiring him to claim it, in due time. *Civ. Code*, 414, *art.* 19, 20.

If you delivered me a thing, which Peter

East'n. District. *Dec.* 1819.

JENNINGS vs. GOZE's ex'rs.

had desired you to deposit with me, without telling me that Peter gave it to you to bring it to me, the deposit is made in your name. You have an action to recover it from me, though Peter may compel you *mandati judicio* to cede your action to him. *Pothier, Depot. n.* 48.

Thus it is clear that, even if the plaintiff had shewn that he had directed Edmundson to deposit his money with the testator, it could not be recovered in this action, without a transfer of Edmundson's right having been previously obtained; because Edmundson did not inform the testator that the money was deposited in the plaintiff's name, or for his account.

The case is not mended by the circumstance of Edmundson having attended in this case, as a witness, and having proven the deposit: because as he might be compelled to testify, without an inquiry into his right to the money, his attendance does not shew a voluntary transfer of it, and no compulsory one has been obtained. The right is still in him exclusively, and the plaintiff cannot have any action against the defendants except through, or contradictorily with, him.

The decision, in this case, will seem in contradiction with that in the case of *Musson* vs.

Bank U. S. & al. v. Martin, 707. It is not, however, so. We then pronounced on the rights of Musson and White. The bank did not appeal, does not appear to have resisted the claim in the district court, and was satisfied to pay the money deposited to the one of the contending parties legally entitled thereto. As it did not appeal, the judgment of the district court could not be amended in its favor.

It is, therefore, ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed, and that there be judgment for the defendants, as in the case of a nonsuit, with costs in both courts.

Preston for the plaintiff, *Workman* for the defendants.

ARNOLD vs. *BUREAU.*

APPEAL from the court of the first district.

The indorser of a note, cannot claim its amount, if it be not re-indorsed to him, unless he has paid it to one of the subsequent indorsees.

MARTIN, J. delivered the opinion of the court. This cause is brought on two promissory notes of an equal sum, amounting together to 447 dollars, payable to the plaintiff sixty days after date. They are of the 8th and 18th of January, 1801.

East'n. District. *Dec.* 1819.

ARNOLD *vs.* BUREAU.

The answer sets forth, that on the 15th of May, 1811, the plaintiff gave to the defendant his promissory note for one fourth of the sum now claimed, in full satisfaction and discharge of it, which was so received by the plaintiff. Further, that on the same day, in pursuance of an agreement made by the defendant with his creditors, before a notary public, which is annexed to the answer, he delivered to W. & J. Montgomery, the plaintiff's agents, his notes for $111 75, payable nine months after date, endorsed by Deehon & Allen, which were received by them, according to the aforesaid agreement, in full payment and satisfaction and discharge of the two notes now sued upon, which said note has since been paid.

A few days after, the defendant filed a further plea, viz.—that W. & J. Montgomery were the owners and proprietors of the aforesaid two notes, on the 15th of March, 1811, and the defendant made the aforesaid agreement with them and they received the note for $111 75, annexed to the answer, in full payment and discharge of those now sued upon.

There was a verdict and judgment for $325 25, for the plaintiff, and the defendant appealed.

The case is submitted to us on the following statement and bill of exceptions.

J. Montgomery deposed that W. & J. Montgomery were the proprietors, by endorsement of the notes annexed to the petition, at the time they became payable, and until and after the 15th of March, 1811. They were duly protested. The small note, annexed to the answer, was received, according to the agreement between the defendant and his creditors, and it was afterwards paid. This agreement was signed by W. & J. Montgomery.

While the cause was on trial, the plaintiff's counsel asked J. Montgomery, a witness for the defendant, whether his house had received the remaining three fourths of the amount of the notes in suit, from the plaintiff. The defendant objected to the question and the objection being sustained by the court, the plaintiff's counsel took a bill of exceptions.

The plaintiff offered to prove, by witnesses, that several persons, who were creditors of the defendant in March, 1811, and remaining so till the 15th of May following, resided in New-Orleans, and did not sign the agreement between him and his creditors. This was objected to by the defendant's counsel, and the objection sustained by the court, and the plain-

East'n. District. Dec. 1819.

ARNOLD vs. BURRAU.

tiff took a bill of exceptions. The court in signing the bill expressed, as the reason for which the testimony was rejected, that none but creditors could impeach the agreement: and the plaintiff is not a creditor, the maker of the note having been discharged under the agreement.

In the charge to the jury, the court said that the plaintiff, not being a creditor of the defendant at the time, could not take advantage of any want of compliance, by the defendant, with any of the stipulations of the agreement, and that the act of W. & J. Montgomery in receiving the note for one fourth of the debt was of itself a presumptive evidence, and wanted nothing further to effect a discharge of the drawer, and of course of all the endorsers. The plaintiff's counsel took a bill of exceptions to this part of the charge.

As the plaintiff did not appeal, there is no necessity of examining the opinion of the judge, which he excepted to, before we consider the case on its merits, and not even then unless the judgment of the district court be reversed.

The plaintiff's original cause of action, charged in the petition, is not denied; but the defendant contends that the action has been extinguished: first, because the plaintiff received

another note in full discharge, satisfaction and payment of the two original ones. The same plea is repeated in the answer under another form, viz. that W. & J. Montgomery, the plaintiff's agents, did receive, &c. A further and last plea followed, by which the two former appear abandoned, and the case put on another issue, viz. that W. & J. Montgomery were the owners of the notes on the 15th of May by endorsement, &c. If this be proven, the plaintiff is without interest, and cannot recover: for the Montgomerys cannot be the owners of the notes in this manner, unless the plaintiff, the original payee, endorsed them, and so parted with his original interest; and he cannot have any claim, unless the notes were either endorsed back to him, or he paid their amount, on the failure of the defendant.

The latter plea is inconsistent with the former, in which the Montgomerys, are said to have been the holders of the notes, as agents, and in the right of the plaintiff. The permission to file this plea must be considered as a permission to withdraw the former, with which it is inconsistent.

The latter is proven by the testimony of J. Montgomery, who says that the firm were holders by indorsement. If so, they had the legal

East'n. District. *Dec.* 1819.

ARNOLD vs. BURKAU.

right to the amount, and nothing shews that the plaintiff had retained the equitable one.

The judgment of the district court is therefore annulled, avoided and reversed.

It remains for us to inquire whether the district court ought to have given judgment for the defendant or dismissed the plaintiff's petition.

This must be preceded by an inquiry whether the plaintiff has been permitted to produce all the legal evidence which he has presented, in other words by an examination of the bills of exceptions.

If the plaintiff shew that he paid the remaining three fourths of the amount of the notes which he had endorsed to the Montgomerys, he will have the right of shewing that several persons, creditors of the defendant in March 1811, remaining so till the 15th of May following, resided in New-Orleans, and did not sign the agreement.

The same observations apply to the part of the charge excepted to.

It is, therefore, ordered, adjudged and decreed that the case be remanded for a new trial, with directions to allow the plaintiff to prove the payment to the Montgomerys; on his doing so to prove that there were creditors of the de-

fendant, residing in New-Orleans, who did not sign the agreement between him and his creditors; and in such a case that the court conform the part of the charge excepted to, to the principles expressed in this opinion; and it is ordered that the costs of the appeal be borne by the defendant and appellant.

Morse for the plaintiff. *Wilson* for the defendant.

LYNCH vs. *POSTLETHWAITE*, *ante* 84.

Amendment denied.

This case came again before the court, on a motion to amend the judgment.

Livermore, for the plaintiff. Our motion is to amend the decree so as to give to the plaintiff the benefit of his contract, and the relief to which he is entitled, according to the opinion of the court. By the contract, the defendant and his partners did covenant and agree to pay the plaintiff 65,000 dollars in manner following, that is to say, 15,000 dollars at the time of the delivery of the boat, 12,500 dollars in three months thereafter, 12,500 in six months thereafter, 12,500 dollars in nine months thereafter, and 12,500 dollars, the residue, in twelve months thereafter with interest at six per cent

East'n. District
Dec. 1819

LYNCH
vs.
POSTLE-
THWAITE.

upon these instalments. Then follows an additional covenant to give notes, and a farther covenant for a mortgage. This covenant for the notes was introduced for the convenience of the plaintiff, that he might have a security which could be negociated, and upon which he could raise money. But there is no condition that these notes should be accepted as a discharge of the principal covenant in the agreement. All the advantage which the plaintiff might have expected from the possession of these notes is lost by the delay in giving them. The covenants of the defendant in the deed are a sufficient security for the instalments; and he has no advantage in the possession of securities of an inferior degree. Why should he desire the notes of the defendant for sums of money already due? On the 19th of February last, when the boat was tendered, and when the defendant was bound to receive her, the plaintiff might have waived the covenant for the notes; inasmuch as a party may dispense with a condition introduced for his benefit. Or if he had accepted the notes, he need not have accepted them as payment. If he had received them, and they had been regularly paid, it would have been a payment; but if they had not been paid, he would not have been obliged

to bring his action upon the notes, but might have brought it upon the covenant. Even in the case of a debt of no higher nature than a a note, the taking of a note is not payment, unless it is specially agreed to be so taken. *Packford* vs. *Maxwell*, 6 *T. R.* 52. *Owenson* vs. *Morse*, 7 *T. R.* 64. *Tapley* vs. *Macturs*, 8 *T. R.* 451. *Marsh* vs. *Pedder & others*, 4 *Campb. N. P. C.* 257. By this contract it is not provided that the notes shall be a discharge of the principal covenant, and therefore I conceive that in this respect the decree should be amended. In the above cases the original debts were of no higher nature than the securities given, and the case of a covenant is much stronger. In this case, the effort is to discharge a debt by specialty, by giving a mere simple contract security.

The next point concerns the interest to be paid. I contend that we are entitled to interest at the rate of six per cent. per annum upon the whole sum, from the nineteenth of February. It is expressly provided by the contract, that interest shall be paid upon the instalments, and as the non-payment of the 15,000 dollars was not then calculated upon, this shews the intention of the parties that the vendor should have interest for all the purchase money not paid.

East'n. District
Dec. 1819

LYNCH
vs.
POSTLETHWAITE.

Therefore, by the cases of *Robinson* vs. *Bland*, 2 *Burr.* 1085, and *Eddowes* vs. *Hopkins*, *Dougl.* 376, he is entitled to interest at six per cent. upon the whole sum.

The contract also entitles the plaintiff to a mortgage upon the boat as a collateral security for the purchase money unpaid.

I have considered the question respecting the rights of the plaintiff growing out of this contract, according to the common law of England, by which the nature and effects of the contract must be determined. The question, how far the court can make a decree which will give effect to those rights, must be determined by the laws of this state. When we attempt to ascertain the nature and extent of the remedies pursued here, by reference to the complicated systems of practise in the English courts of chancery and common law, we are sure to be bewildered and led astray. We have nothing analogous to the systems of those courts. In England the ordinary remedy, for a breach of contract, is in a common law court, in which damages for a non performance can alone be recovered. The extraordinary jurisdiction of the court of chancery, in decreeing a specific performance, has been established after a severe conflict with the ordinary tribunal, but not in a

full extent. This extraordinary jurisdiction extends only to cases which affect real property. But, in Louisiana, we have no such distinction between courts administering justice according to the ordinary forms of law and courts giving relief beyond the ordinary rules. Almost every action which is here brought upon a contract is in effect an action to enforce a specific performance. When a penalty is stipulated to be paid upon a breach of the contract, the party has his election by our laws to sue for the penalty, in which case the action is for damages, or upon the contract, which is for a specific performance. *Pothier, des Obligations* 342, 343. When the party sues upon the contract, the terms of that contract and the breach of it are stated in his petition, and he concludes with a prayer for relief adapted to the nature of his case. When the prayer for relief is sufficient to give him an adequate remedy, it can hardly be maintained that, in our practice, his rights will be impaired by joining another prayer for an inadequate remedy, particularly when he adds a general prayer for further relief according to the equity of his case. At all events, when the petition, and the evidence contained in the record, give a full view of the injury which he has sustained, and of the redress to

East'n. District. *Dec.* 1819.

LYNCH vs. POSTLETHWAITE.

which he is entitled, the powers of this court are fully adequate to give him full relief, even if he has mistaken the nature and extent of the relief to which he is entitled. By the act of the legislature of 1813, it is provided, that "no judgment or decree shall be reversed for any defect or want of form, but the said supreme court shall proceed and give judgment according as the rights of the case and matter in law shall appear unto them, without regarding any imperfections, or want of form, in the process or course of proceeding whatever." 1 *Martin's Digest*, 444. This would seem to be conclusive. Accordingly this court decreed, in the case of *Decuir* vs. *Packwood*, 5 *Martin*, 300, that the plaintiff should recover the whole money. In that case the sugar was to be paid for by instalments, the defendant was to give notes for the instalments; the action was brought before either of them became due, and the petition prayed for notes.

The judgment in the present case must, of course, be given as of the last term. The plaintiff was then entitled to 15,000 dollars, together with one instalment of 12,500 dollars and interest, upon these two sums, at six per cent. from the 19th day of February. He was also, I humbly apprehend, entitled to a decree, that

the defendant should pay him the further sum of 12,500 dollars on the 19th of November, and the further sum of 12,500 dollars on the 19th of February, 1820, with interest upon these three last instalments at the rate of six per cent. per annum, from the 19th of February, 1819; and also to a mortgage upon the boat. This would be a specific performance, according to the terms of the contract. The defendant might also be required to execute notes, in the form prescribed in the contract, for the last payments, but not to have these notes taken as a discharge of the judgment. Such is the relief, which I have no doubt, this court has the power to grant. Nor do I doubt that an English court of chancery would grant the same relief. Where the vendor of real estate, to be paid for by instalments, sues in chancery for a specific performance, such must be the decree. And if the defendant does not perform the decree, by making the payments at the times prescribed, process of attachment against his person, and sequestration against his property, would be awarded for the contempt.

Hawkins, for the defendant. By examining the common law authorities to which the plaintiff's counsel have referred, in support of their

East'n District. Dec. 1819.

Lewis vs. Postlewaite.

motion, it is difficult to find their applicability.

Tested by the principles of the common law the question presents no difficulty. The only remedies known to the common law are by action of covenant, where the instrument declared on is a deed or bond under seal, or action on the case where the writing declared on is not under seal—in both of which actions recovery of damages only is had. It is true, in the action at law for damages, the plaintiff would have a right to assign as many breaches as he deemed proper; or, from time to time, to sue so often as the breaches on the part of the defendant gave cause of action. Yet it is equally true that, in no action at law, could the plaintiff recover damages beyond the breaches assigned and sustained against the defendant.

The position contended for by the plaintiff's counsel, that the stipulation for the delivery of the notes of the Natchez Company should be deemed a covenant for the benefit of the plaintiff, and he had a right to wave the reception of the notes and go for money, is so untenable as to need no comment. To sanction such doctrine would be to annihilate all the principles which govern mutual or reciprocal covenants.

It would in fact not only authorise recovery against the defendant, for all his breaches of

East'n District. Dec. 1819.

LEACH vs. POSTLETHWAITE.

the contract, but enable the plaintiff to take advantage of his own wrong, by first refusing to receive the notes of the company, which he is bound to do by the contract, and convert his refusal into new and extended grounds of recovery against the defendant for money, when he had stipulated in the contract to deliver the plaintiff the notes of the Natchez Company only.

To occupy time in repelling a doctrine like this could be construed into little else than a want of proper respect for the tribunal we address.

The plaintiff, not having sued in a court of common law jurisdiction, seeking his recovery of damages only, but having appealed to a court vested with equitable jurisdiction for a specific performance of the contract; the only necessary enquiry is, has specific performance been decreed by this court. If so the question is at rest, and the decree cannot be amended or altered.

By the contract sued on the plaintiff sells to the Natchez Steam Boat Company a boat for $65,000 to be discharged by the payment of $15,000 at the time of delivery; and the residue $50,000 in the notes of the Natchez Company, payable in four instalments of three, six, nine and twelve months, with interest.

Upon this contract, the plaintiff commenced

East'n District Dec. 1819.

LYNCH vs. POSTLE-THWAITE.

his action, alledging that "the defendant was personally bound, and had refused to comply with and fulfil the part thereof which he was bound to perform"--Wherefore the plaintiff prayed that the defendant be cited to appear, and decreed to execute the promissory notes and make the payment of $15,000 with interest and costs.

The supreme court have decreed that "the plaintiff recover from the defendant the sum of $65,000; to be discharged by the payment of $15,000, with interest from the inception of suit, and the delivery of the notes of the Natchez Steam Boat Company for the sum of $50,000 in four instalments of three, six, nine and twelve months from the 19th February, 1819, the day on which the plaintiff alledged his readiness to deliver the boat."

If this is not decreeing performance of this contract in its broadest and most comprehensive sense against the defendant, it is difficult to conceive what performance is.

The plaintiff obtains all that is stipulated to be given him—its execution is decreed in the fullest extent of the covenant, and in the manner claimed and prayed for by the plaintiff, and yet the court is now urged to do still more.

By this motion the court are called on to go

out of the record and pleadings in the cause, to make out a new and better case for the plaintiff, whereby he is to be absolved from his own covenants, and a new and hard covenant imposed on the defendant; to wit, the payment of money, when he has stipulated only for delivery of the notes of the Natchez Company.

The efforts of the counsel to give some colour to their motion by appealing to what they call the liberal rules of practice which govern courts of equity, (to which they assimilate our own) were as unsuccessful as the ground they take in support of the motion is untenable.

In vain were the counsel of the plaintiff appealed to for a single authority, either from the common or civil law writers, which sanction the alteration in the decree now required of the court.

We were referred, in general terms, to the liberality of courts of equity in matters of contract. We cannot too much admire that system of jurisprudence which effects the objects of justice without regard to mere form and technicality. Yet no court, in this nor any other country, has ventured to place itself above all rule and precedent in regard to its proceedings. Go the length contended for in this motion, and the equitable discretion, to which

East'n District. Dec. 1819.

Lynch vs. Postlewaite.

our admiration has been called, would sink into arbitrary oppression.

Equity has been well defined to be the "correction of that wherein the law (by reason of its universality) is deficient."

Courts of equity have grown into use, not by altering or changing the principles of law or interpretation of contracts, or established usages of other courts, but as mere helpmates to the various remedies necessary to the ends of justice.

According to the English and American authorities, where the remedy is adequate at law a court of equity will not interfere. But, when it does interfere, a court of equity is as implicitly bound down by established precedents and influenced by the same just rules of interpretation, whether of law or of contract, which govern the common law judge.

And where this not the case, courts of equity would rise above all law either common or statute, and be a most arbitrary legislator in every case. Neither a court of law or equity can vary men's wills or agreements; both are to understand them truly and uniformly; one court cannot abridge, nor the other extend; and the rules of decision in both courts are equally apposite to the subjects of which they take

cognizance. 1 *Black. Com.* 61; 3 *id.* 50, 429, 435, &c.; 2 *Powell on Cont.* 3.

The principal reason urged why the court should now alter their decree is, that since the inception of this suit in the court below, some of the notes of the Natchez Company, prayed to be delivered to the plaintiff in his petition, would be now due, if they had been so delivered; and, therefore, the plaintiff is entitled to have a decree against the defendant, Postlethwaite, for money, in lieu of notes.

With the same propriety could it be urged that the plaintiff, holding a covenant for four parcels of cotton, at different and distant periods, deliverable at Natchez, might (because he had one other parcel deliverable at New-Orleans) at his own option waive reception of cotton, hold on to the contract, until the last period of delivery, and then demand money for the whole amount in New-Orleans. Could it not as well be urged that the plaintiff holding four several promissory notes of the defendant, pending a suit for one note another became due, and, therefore, the plaintiff would be entitled to a judgment for the amount of both notes?

With equal justice, but certainly not less absurdity, could the plaintiff's counsel contend, that in a suit for assault and battery, or other

Ea'n District. *Dec.* 1819.

LYNCH vs. POSTLETHWAITE.

wrong, the plaintiff could, not only recover for torts committed previous to the commencement of the suit, but for every other battery or tort between the inception of the suit and time of pronouncing final judgment.

At the commencement of the present suit, by Jasper Lynch, had he any right of action against the defendant, Postlethwaite, for the amount of either of the notes of the Natchez Company? No such cause of action existed; none such was urged or prayed for; but the defendant was sued to compel him only to deliver the notes of the company together with the cash payment of 15,000 dollars.

If the plaintiff is entitled to a decree now, for the amount of one note, and for which no cause of action existed, or was urged, at the inception of this suit, the plaintiff had nothing to do but commence his action, delay trial until the last note arrived at maturity, and then demand judgment for the whole amount in money, when he had expressly stipulated to receive, and had sued to recover, notes.

Was this court, or any other intelligent tribunal, ever before urged, in the rendition of their judgment, not only to award damages and recovery for all the causes of action which actually existed and were prayed for when the

action was commenced, but to include in their decree all damages and debts which might have arisen or accrued between the inception of the suit and rendition of judgment?

But this court is called on to do more; to merge its appellate character; to erect itself into a tribunal of original jurisdiction; to make out a new cause of action, and found a decree upon new matter not tried, or ever urged, before the court below.—Indulge doctrine like this, and where its mischiefs would terminate is difficult to conceive. No precedent or authority from the civil law books was produced by the plaintiff's counsel; none can be produced, sanctioning proceedings like this.

The reference to Pothier, so far as it goes, is good authority for the defendant: for it is there declared that the "plaintiff ought to elect either to claim the execution of the principal obligation, or the penalty: that he ought to be satisfied with one of them." Here the plaintiff has sued for specific execution of the contract. And the court are called on to violate all the established principles of practice to give him more. *Pothier Obl. 342. Civil Code accord.*

As to the act of our own legislature declaring "that no judgment shall be reversed for any defect or want of form," &c.: we have not,

East'n District Dec. 1819.

LYNCH vs. POSTLETHWAITE.

nor is it at all necessary to question the soundness of this legislative enactment. No want of form is complained of in this case; the court are called to remedy no technical defect of pleading whereby injustice has been done. The plaintiff has sued for, and prayed and obtained a decree for, all that his contract gave him. No principle of law or justice will justify the court in going farther. We are referred, however to the case of *Decuir* vs. *Packwood* as conclusive in favour of the plaintiff.

There is no analogy between the cases. In that case the plaintiff had a right to sue, and enforce either specific execution or damages for non-compliance. He did so sue; the parties appealed to a jury to award on their contested rights, and the jury awarded a verdict for damages to the whole amount due, instead of awarding specific performance.

The jury had a right to give the one or the other; the debt, in the case of Packwood, was the individual debt of the defendant; the whole amount of the debt had become due, and the defendant did not even urge his right to a specific performance, but submitted the whole cause to the jury. In that case, there was no covenant to make payment for the sugar purchased, by the delivery of notes on a third person, and

them payable in another state, at different and distant periods, as in the case now before the court.

There is surely no ground for this additional benefit to the plaintiff, on the score of favour.

It is admitted, on all hands, he has obtained a decree for an enormous sum of money, considered in regard to the value and condition of the subject of purchase.

In the decree pronounced by this court, they express a reluctance at decreeing the whole amount claimed, having on the first view of the subject deemed an abatement justifiable.

With this view of the subject, we cannot presume this court will now step out of the usual course of practice to add new benefits to the plaintiff, by imposing new penalties and exactions in what the court considers already a hard case against the defendant.

As to the question of interest, it was submitted to the court. They have correctly fixed it at five per cent. on the 15,000 dollars cash payment at New-Orleans, that being the interest allowed by law in this state.

As to the interest on the notes of the Natchez Company, that will be regulated by the laws of Mississippi where the notes are payable.

As to the mortgage: it is an after thought

East'n. District. Dec. 1819.

LYNCH vs. POSTLETHWAITE.

altogether, to give some pretence to open the present decree. It never was demanded or required; and it would be executed as a matter of course whenever the plaintiff thinks proper to require it.

MARTIN, J. delivered the opinion of the court. The plaintiff prays that the judgment of this court, pronounced in this case, at last July term, may be amended. An amendment can only take place on account of some error of the court in rendering the judgment. If the principles of the case have been misunderstood, if the court has mistaken the law, in other words, has erred in forming their judgment, a remedy must be sought in a rehearing, so that the whole case may be re-examined, and the judgment rather changed than amended.

In the present case, the court is not sensible of any thing in the judgment rendered that requires, or is even susceptible of amendment; nor that any other judgment might have correctly been given.

The petition called upon the court *à quo*, not to award damages against the defendant for failing to perform his part of a contract, but to enforce a specific performance. This decree was, according to the provisions of the contract, for the payment of 15,000 dollars, and the exe-

cution and delivery of four notes of the Natchez Steam Company of 12,500 each. The prayer of the petition was for the payment of that sum, and the execution and delivery of these notes, or in the alternative, the payment of 65,000 dollars.

The district court could not have decreed copulatively what was asked only in the alternative. It would have been monstrous to have given judgment for the notes and their amount. For, after the judgment might be satisfied by a levy of the 65,000 dollars, the defendant would have remained liable to pay his notes, in the hands of an indorsee, without the possibility of legal relief against them.

If it had given judgment for 65,000 and interest against the defendant, without its having been prayed for in the alternative, it would have done an injustice to both parties, in the interpretation of the contract: to the plaintiff in withholding from him the benefit of the greater security, which he had contemplated in notes, binding the defendant and all his copartners: to the defendant in making him liable alone, and aloof from his copartners, as to the deferred instalments, for which he had expressly and tenaciously stipulated that he should not give a note, which might be tendered as a set off against

Eas'n. District. Dec. 1819.

LYNCH vs. POSTLETHWAITE.

any private demand of his, and on which he had right to command the aid of his copartners, according to the law of his domicil and the place of contract, by resisting the plaintiff's suit, till all his debtors within the state were made parties.

Whether a judgment for the sum of 65,000 dollars, with interest, the execution of which should be partially suspended to meet the terms of the contract, ought not to have been decreed, if the plaintiff had not prayed for a specific performance, but sought his relief in damages, is a question which made no part of our inquiry in the present case.

The judgment of the district court appeared, therefore, to us perfectly correct, except in the deduction of 20,000 dollars, and ours has rectified this error.

It is true, since the judgment of the district court, one of the instalments had become due at the time that the judgment of this court was pronounced, and two have become due since. If the amount of the instalment which had become due when we gave judgment, had been a sum of money which might have been opposed by the creditor of, it as a set-off against a claim of the debtor, if the latter had been alone absolutely bound therefor, perhaps that the imme-

diate payment of it would have been ordered. But this is not the case; the sum is one for which he is solidarily bound *sub modo* only.

We, therefore, conclude, that the judgment cannot be so amended as to substitute the absolute payment of 12,500 dollars, in lieu of the note decreed to be executed.

As to the other two instalments, which were then not yet payable, there is not any semblance of reason, in the proposition that the judgment ought to be amended.

It is said that the judgment ought to be amended, and six instead of five per cent. allowed for interest on the sum of 15,000 dollars, the first payment. We allowed the legal interest of this state, for the failure of the timely payment of a sum stipulated to be paid therein. But it is said that, as to the deferred instalments to be paid at Natchez, six per cent. was agreed to be paid, and consequently the presumption is, that six per cent. was intended by the parties, as the just indemnification, in case of a failure of payment of the first sum. Had this first sum been made payable in New-York, where seven per cent. is the legal rate of interest, it would have been contended, and it is believed with

East'n District. Dec. 1819.

Lyons vs. Postlethwaite.

success, that as the contract was silent, as to the interest to be paid on the first sum, the law must regulate it, and that law must be that of the place of payment. In this respect the judgment needs no amendment.

As to the interest on the instalments the contract and the law of Mississippi are sufficiently explicit.

We are requested to amend the judgment by declaring that the notes decreed to be given are not those of the incorporated company. We have decreed what notes are to be given; we need not say what are not to be given.

A mortgage of the boat was not prayed for in the petition; a general performance was not there demanded; its not being denied by the district court was not presented to us as a ground of complaint against the judgment; our attention was not drawn to this part of the case, which was entirely overlooked by the plaintiff's counsel, and it did not appear our duty to consider it.

It is ordered that the plaintiff take nothing by his motion.